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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,	:	07-CR-587(CBA)
	:	
	:	
-against-	:	United States Courthouse
	:	Brooklyn, New York
	:	
	:	
TIMOTHY DONAGHY,	:	July 2, 2008
	:	11:00 a.m.
Defendant.	:	
- - - - -	X	
- - - - -	X	
UNITED STATES OF AMERICA,	:	08-CR-0086(CBA)
	:	
	:	
-against-	:	United States Courthouse
	:	Brooklyn, New York
	:	
	:	
JAMES BATTISTA and	:	July 9, 2008
THOMAS MARTINO,	:	9:30 a.m.
	:	
Defendant.	:	
- - - - -	X	

TRANSCRIPT OF CRIMINAL CAUSE FOR ORAL ARGUMENT
BEFORE THE HONORABLE CAROL BAGLEY AMON
UNITED STATES DISTRICT JUDGE

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Oral Argument

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1 (In open court.)

2 (Defendants Donaghy and Martino are present in open
3 court; Defendant Battista is not present.)

4 (Mr. McMahon appears via telephone.)

5 (Judge CAROL BAGLEY AMON takes the bench.)

6 THE COURT: Good morning.

7 MR. GOLDBERG: Good morning.

8 MR. LAURO: Good morning.

9 COURTROOM DEPUTY: United States versus Donaghy,
10 Batista, and Martino.

11 Please state your appearances for the record.

12 MR. GOLDBERG: Jeffrey Goldberg, Alexander Solomon
13 for the Government and Brandon Maxon from Probation.

14 MR. LAURO: John Lauro on behalf of Mr. Donaghy who
15 is here in Court.

16 MS. HERR: Vicki Herr here on behalf of Mr. Martino.

17 THE COURT: Mr. McMahon is on the phone?

18 MR. MCMAHON: Yes, I can hear you.

19 THE COURT: Can you hear me?

20 MR. MCMAHON: Yes, Your Honor.

21 MR. SHECHTMAN: Paul Shechtman for the National
22 Basketball Association.

23 THE COURT: I'm sorry, Mr. Shechtman.

24 Mr. McMahon, I understand that you need today
25 appear by phone this morning because you are currently on

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1 trial.

2 MR. MCMAHON: Yes, Your Honor, I'm in the middle of
3 a homicide jury trial. We're halfway through the Government's
4 case and we've been on it for a while, so, I'm here. In fact,
5 I'm in the courtroom.

6 THE COURT: I understand that your client is not
7 here. I take it he waives his appearance for any argument
8 that we have today.

9 MR. MCMAHON: Yes, Your Honor.

10 THE COURT: The principal issue, as it pertains to
11 your client, that's outstanding, deals with the issue of
12 restitution. I had directed last week that all of the papers
13 that were filed by the NBA be served on you.

14 MR. MCMAHON: We received a package, I believe,
15 Wednesday or Thursday before the holiday last week. A very
16 voluminous package, yes, we did.

17 THE COURT: Have you had the opportunity to go
18 through it? It was submitted last week.

19 MR. MCMAHON: I reviewed some of it, I have been on
20 this murder trial. I reviewed some of it, not all of it,
21 because it's very -- a lot.

22 THE COURT: Well, Ms. Herr was able to respond today
23 and in a very comprehensive fashion to the material that was
24 submitted, and I take it you were not able to do that because
25 you were on trial.

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1 MR. MCMAHON: Like I said, I've been on a murder
2 trial since -- I was, you know, I've looked at it and I didn't
3 receive the Government's brief about restitution as in reply
4 to my guy until yesterday morning was when I received it and,
5 in fact, I didn't see it until 5 o'clock when I came back from
6 court.

7 It was apparently filed at 8:30 on Monday
8 night, somewhere around there. I went right to court and I
9 received it last night at around, well, Tuesday night at
10 around 5:30 when I first saw the Government's 18-page document
11 which I thought was supposed to be filed last week.

12 THE COURT: When can you respond to this, Counsel?
13 Could you respond to these submissions by Monday?

14 MR. MCMAHON: Pardon me.

15 THE COURT: Can you respond to these submissions by
16 Monday?

17 MR. MCMAHON: Yes. I mean, I can do it. I'm
18 finishing this murder case and then I'm going away, but I can
19 get something done. I can do it, Judge.

20 THE COURT: If you're seeking an adjournment here,
21 if I grant you an adjournment, it's only going to be a short
22 one so I don't know.

23 MR. MCMAHON: I don't want a short one.

24 THE COURT: When were you talking about going away?

25 MR. MCMAHON: I have a week's vacation leaving this

Oral Argument

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1 Saturday to Sunday, and then after that I can do it any day
2 that you wish. The following week would be fine.

3 THE COURT: There's one issue before I let you
4 resume your trial, and in order to clarify the briefing on
5 this issue, it's the Government's position in your letter that
6 this, Mr. Battista's crime, is covered by the Mandatory
7 Provisions of the Restitution Act.

8 Why is that?

9 MR. GOLDBERG: It's covered by the MVRA because the
10 MVRA applies to any case where there is an identifiable victim
11 who has suffered a pecuniary harm.

12 THE COURT: No, there is another requirement in
13 addition to that. It has to be a crime of fraud or deceit.
14 That's "and," not "or."

15 MR. GOLDBERG: We believe that the specific conduct
16 underlying the basis of conviction, the offense of conviction,
17 is all about fraud and deceit. That's what this case is
18 about, that's what his conviction is about, and that is what
19 is specified in Count Two of the indictment. If you consider
20 the paragraphs that were incorporated therein, the overt acts,
21 as well as his allocution.

22 THE COURT: So, it's your position that this is
23 under §C1(a)(2), an offense committed by fraud or deceit.

24 MR. GOLDBERG: Yes, Your Honor.

25 THE COURT: Because in order to prove the count,

Oral Argument

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1 wagering, you don't have to prove any fraud or deceit.

2 MR. GOLDBERG: That's true, but I believe that the
3 restitution statute is not construed that narrowly.

4 THE COURT: Do you have any case law to support the
5 proposition that it's not the crime itself that's charged, but
6 it's the way it's committed. Because the way I read your
7 papers, and maybe I didn't read them correctly, but I thought
8 you were simply relying on the identifiable victim because
9 that was cited and that's not enough. I wasn't sure that you
10 were relying on the fraud or deceit.

11 MR. GOLDBERG: Well, the case law, Your Honor, that
12 we've relied on is the whole line of Hughey and its progeny
13 which talks about the specific conduct that is the basis of
14 the offense of conviction. And, I think it's consistent with
15 the goals of the MVRA. I know one case, I don't know if we
16 cited it, I think it's called Brock Davis.

17 THE COURT: Well, I don't know in your papers,
18 Mr. Goldberg, you relied on the fact or talked about the issue
19 of fraud or deceit in terms of this being an offense that
20 involved fraud or deceit, the wagering offense.

21 MR. GOLDBERG: I think that's all part and parcel of
22 the offense as specified in the indictment, we put that in our
23 papers, and also based on his allocution. I don't think you
24 can construe his offense of conviction as narrowly as
25 Mr. McMahon wants to, and so, that's why we've taken our

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1 position. To the extent that we didn't specifically identify
2 the fraud or deceit condition that's my error, but certainly
3 we believe it exists.

4 THE COURT: Is the probation officer here on
5 Mr. Batista's case?

6 MR. GOLDBERG: It's the same officer.

7 THE COURT: There are different names on the report.

8 MR. MAXON: Your Honor, I prepared the Offense
9 Conduct Reports for all three defendants.

10 THE COURT: I think Mr. McMahon actually made an
11 objection to this and I didn't see a response.

12 MR. MAXON: I actually became aware of the objection
13 letter yesterday. I'm in the process of preparing a response.
14 With respect to restitution, Probation agrees with the
15 Government's position.

16 THE COURT: Well, alternatively, it seems like to me
17 that an argument could be made that restitution would be
18 appropriate under §3663 which is not mandatory restitution,
19 but restitution under which the Court has to consider a number
20 of factors such as the financial ability to pay, et cetera.

21 Does the Government take the alternative
22 position that it should be imposed under that section?

23 MR. GOLDBERG: We do, Your Honor.

24 THE COURT: All right, here's what I would like to
25 do in terms of the briefing on this.

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1 Mr. McMahon, I'd like for you to address the
2 issues in your letter on the 14th. Address whether it comes
3 under the Mandatory Provision as well as addressing whether
4 you believe it comes under the Permissive Provision.

5 MR. MCMAHON: I understand.

6 THE COURT: And I'd ask the Government on that same
7 date, the 14th, to indicate to the Court why it thinks it also
8 comes under the Permissive Provision.

9 MR. GOLDBERG: Yes, Your Honor.

10 THE COURT: And, additionally, if you have any case
11 law to support your proposition that this is the offense, does
12 not have to itself be fraud or deceit but one that just uses
13 fraud or deceit. And also, Mr. McMahon, in that submission, I
14 want you to also address any issues that you may have with
15 respect to the extent of the NBA's submission the extent of
16 the restitution that Mr. Battista is being held responsible
17 for. They're seeking to hold him responsible, the Government
18 is seeking.

19 MR. MCMAHON: I will do that.

20 THE COURT: I want a comprehensive submission from
21 you by the 14th.

22 MR. MCMAHON: Yes, Your Honor.

23 THE COURT: Any responses to that submission by the
24 NBA or the Government to be filed by the 18th, and also I
25 don't -- the briefing, as far as I'm concerned, with respect

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1 to the issues of restitution, Mr. Lauro, Mr. Donaghy is over.
2 It's complete; I've seen everything that I've seen. If you
3 believe that anything that Mr. Battista or Mr. Martino has
4 said impacts you, and you want to comment on that, you can
5 comment solely on those issues on the 18th.

6 MR. LAURO: Yes, Your Honor.

7 THE COURT: Do you understand?

8 I don't want any repetition, I certainly have
9 more than enough paper on the issue of restitution. I don't
10 want anything further other than if you believe that
11 Mr. Martino or Mr. Battista say something regarding your
12 client that you don't think is supported you can comment on
13 that. But, otherwise, I don't want any other submissions from
14 you.

15 So, I think that under all the circumstances,
16 it is probably preferable to have the issues of restitution
17 fully before the Court so that the issues can be resolved at
18 the sentencings of all of the defendants without having to
19 have any future proceedings in connection with this case.

20 So, that schedule would permit all of those
21 issues to be fully briefed by the 18th and what I would then
22 propose is to have the sentencings of Mr. Battista and
23 Mr. Martino go forward on the 24th of July at 9:30 and
24 Mr. Donaghy's sentencing go forward on the 29th of July at
25 11 a.m.

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1 All right? Mr. Battista, is there anything
2 else that we need to address with respect to your client?

3 Does the Government have something?

4 MR. GOLDBERG: I do have one minor matter that I
5 would like to put on the record, one correction.

6 THE COURT: Excuse me, I might have misspoken.

7 (Pause.)

8 THE COURT: Mr. McMahon, I'm sorry.

9 MR. MCMAHON: It's okay, I'm here.

10 THE COURT: I'm sorry, you wanted to say something,
11 Mr. Goldberg, with respect to Mr. McMahon's client,
12 Mr. Battista.

13 MR. GOLDBERG: Yes, Your Honor, it actually impacts
14 all three defendants. Two minor corrections to our submission
15 from yesterday, I've informed counsel about them.

16 Number one, we correctly represented to the
17 Court during the July 2nd teleconference that the October,
18 2007 document subpoena related only to Mr. Donaghy. That was
19 not reflected in my cost calculation in light of Fogel.

20 I indicated that those costs should be borne
21 by all three defendants, we disagree. It comes out to about
22 \$15,000, I can back up if I've lost you.

23 In October, 2007, the Government issued a
24 document subpoena to the NBA.

25 THE COURT: Right.

Oral Argument

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1 MR. GOLDBERG: The NBA attorneys incurred costs,
2 approximately \$15,000, to respond to that subpoena. You had
3 inquired with the Government on July 2nd as to whether, as to
4 who that applied to, that subpoena. I indicated correctly
5 that it applied only to Mr. Donaghy and not to Battista and
6 Martino.

7 In my submission of yesterday, I did not break
8 out those costs and, so, they're currently listed, commingled,
9 if you will, with the costs we believe should be borne by all
10 three defendants, so we should break these out. I haven't
11 done the accounting of the exact dollars, but Mr. Shechtman
12 informs me it's about \$15,000.

13 Have I lost you?

14 THE COURT: No, you haven't lost me, but I think you
15 need to put it into a letter with the requisite math.

16 MR. GOLDBERG: Absolutely.

17 THE COURT: Okay.

18 MR. GOLDBERG: The second correction. Ms. Herr is
19 right, I indicated that the status conference in the Battista
20 case was on March 10, 2008, it actually was April 10, 2008, so
21 it shortens the time period under Fogel for costs to be
22 incurred by Battista and Martino. It's only a difference of a
23 few thousand dollars.

24 By the same token Mr. Martino did plead guilty,
25 I believe, eight days before Mr. Battista, so there are some

1 minor costs that should be borne only by Mr. Battista. We'll
2 break out the math, I just wanted to indicate those minor
3 corrections.

4 THE COURT: You need to put all of those into a
5 letter today and serve it on both counsel.

6 MR. GOLDBERG: Absolutely, we will do so.

7 THE COURT: What I intend to do at this point,
8 Mr. McMahon, is to take up some of the issues that have been
9 raised regarding restitution by Mr. Lauro on behalf of
10 Mr. Donaghy.

11 MR. MCMAHON: Okay.

12 THE COURT: And also, I don't know if the Government
13 and the NBA, Mr. Shechtman, prepared a response to any of
14 Ms. Herr's submission.

15 MR. GOLDBERG: I think the only issue -- I read it
16 this morning. The only issue that I think she raises which is
17 out there, I think it's a minor one; I think Mr. Lauro also
18 raises the same issue, is whether the costs, the honest
19 services cost, for 2006-2007 should be, I think, \$72,000 which
20 is what the NBA claims or roughly \$45,000. I think that goes
21 to fringe benefits and things like that.

22 The Government really doesn't have a position
23 on that, that's because, in the end, it's an estimate. I
24 think there are arguments both ways, but I wanted to flag that
25 as something that Ms. Herr put in her submission.

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1 THE COURT: All right. So, Mr. McMahon, do you want
2 to stay on the phone to listen to these arguments.

3 MR. MCMAHON: That's okay, Your Honor, we're going
4 to start this case. I will submit my submission by 7/14 and I
5 will get that to you probably by this Friday.

6 THE COURT: All right. So, you heard the other
7 dates?

8 MR. MCMAHON: I heard that. If Mr. Goldberg could
9 fax me that mathematical breakdown of his additional
10 corrections that would be fine.

11 THE COURT: You heard the sentencing date?

12 MR. MCMAHON: 7/24 at 9:30.

13 THE COURT: Right.

14 MR. MCMAHON: I will be there.

15 THE COURT: That's good news. Okay.

16 MR. MCMAHON: Thank you, Your Honor.

17 MR. GOLDBERG: Your Honor?

18 THE COURT: Yes.

19 MR. GOLDBERG: I'm not sure what the Court has in
20 mind for an agenda going forward. If it's at all possible to
21 resolve the Agent Scala issue, the Government would ask that
22 we talk about that first because in deference to Agent Scala,
23 who is retired.

24 THE COURT: Is Agent Scala here?

25 MR. GOLDBERG: He's in the building.

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1 THE COURT: All right. He's in the building?

2 MR. GOLDBERG: Yes.

3 THE COURT: Okay.

4 MR. GOLDBERG: And, you know, again, we urge the
5 Court to quash the subpoena and deny Mr. Lauro's request; and
6 we believe we've provided Your Honor with sufficient support
7 to do it. There is absolutely no basis for the subpoena and,
8 if at all possible, we would like to discuss that before we
9 get into a long discussion of the remaining restitution
10 issues.

11 Thank you.

12 THE COURT: Okay. Mr. Lauro, I don't know what it
13 is you are envisioning here. You indicate in your papers that
14 you don't wish to call Mr. Scala as a defense witness; that
15 you're somehow calling him for the Court's purposes. I
16 haven't asked to have Mr. Scala here, and I'm not sure that I
17 understand what the issues are or where there's any
18 disagreement.

19 The Government filed a 5K letter which detailed
20 Mr. Donaghy's cooperation. It indicated that he was
21 completely candid and truthful; indicated that he talked about
22 other issues without detailing them, those particular issues.

23 You filed letters yourself going into further
24 information that you say Mr. Donaghy provided. The Government
25 hasn't taken issue with that information or the credibility of

1 that information. I'm not sure that I understand what purpose
2 is served by Mr. Scala's testimony. I mean, I don't think
3 there is any precedent for the fact that the Court should
4 entertain a full-blown discussion of other information whether
5 it could or couldn't have led to additional prosecutions.

6 The Government's letter, the cooperation
7 letter, says that, "It's understood" that a good-faith
8 determination by the Office as to whether defendants have
9 cooperated fully and provided substantial assistance or has
10 otherwise complied with the agreement"; and more pertinently,
11 "The Office's good-faith assessment of the value,
12 truthfulness, completeness, and accuracy is binding on the
13 defendant." I just don't think there's an issue.

14 MR. LAURO: I do, Your Honor. May I be heard?

15 THE COURT: Yes.

16 MR. LAURO: Thank you.

17 Your Honor, first of all, the Court has
18 complete discretion to hear whatever information Your Honor
19 deems relevant to sentencing.

20 One of the most important factors, I believe,
21 in this case is the extent, the nature, and the significance
22 of Mr. Donaghy's cooperation.

23 The Court under U.S. v. Martinez and U.S. v.
24 Bruno, particularly after Booker, can hear a wide range of
25 information concerning a defendant's cooperation whether or

1 not it leads to prosecutable offenses. The problem here,
2 however, is that the Government did not carry its
3 responsibility and its promise to us to provide Your Honor
4 with all of the information regarding Mr. Donaghy's
5 cooperation.

6 Instead, the Government carved out a
7 significant piece of what Mr. Donaghy provided and didn't tell
8 the Court. And, as a result, we had to do that which is a
9 rather extraordinary proceeding, as I think the Government
10 recognized, by having defense counsel put in the position of
11 having to advise the Court about the full extent of somebody's
12 cooperation.

13 Mr. Donaghy provided crucial information with
14 respect to game manipulation by NBA referees. The Government
15 doesn't contest that; the Government doesn't say it was
16 incorrect; the Government doesn't say that that was false.
17 However, the Government didn't even tell you about it, we have
18 to do that.

19 THE COURT: I have the information before me now.
20 The Government in their letter, in great detail, set forth his
21 cooperation in connection with the case that they prosecuted
22 as a result of his cooperation. They suggested he provided
23 other information.

24 It's not been my experience, Mr. Lauro, that
25 every cooperation letter regarding a cooperating defendant

1 goes into minute details about information provided that
2 doesn't ultimately result in another prosecution.

3 So, I just don't understand your position here,
4 but in any event, you have brought the information to the
5 Court's attention, it's before the Court. I don't see the
6 need, and you indicated it's in my discretion, I don't see the
7 need for Mr. Scala's testimony.

8 MR. LAURO: Well, Your Honor, under 5K and the
9 commentary to 5K1, the Court is entitled to hear information
10 beyond what leads to a prosecution. What Mr. Scala can
11 provide is the extent to which the information was
12 corroborated, the significance of the information, the degree
13 to which it could have led to additional prosecutable cases,
14 the impact on the investigation.

15 All of that is important information that the
16 Government has yet to provide, and, I think it puts
17 Mr. Donaghy's cooperation in full context.

18 At this point, I assume what the Government is
19 saying is that there was credible information, honest
20 information, that Mr. Donaghy had provided regarding game
21 manipulation by other referees, and the Government is
22 crediting him with that amount of cooperation and crediting
23 him with the fact that that's true.

24 The question now is what significance there was
25 to the investigation, what corroboration there was, and all of

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1 that Mr. Scala can provide information about.

2 The other issues he can provide information
3 about deal with the variance and the disparity between
4 Mr. Battista who was the leader of this activity.

5 THE COURT: Why can he provide any better
6 information about that? The facts of that are before the
7 Court, Mr. Lauro, I don't think that they're disputed in any
8 way.

9 The Government has agreed that Mr. Battista had
10 a leadership role. Mr. Martino's role in the offense has been
11 set forth in the pre-sentence report and in Mr. Donaghy's
12 pre-sentence report. You haven't taken issue with any of the
13 factual recitation, I don't understand what is not clear.

14 Do you believe that I'm incapable of
15 understanding the roles as set forth in the pre-sentence
16 reports, you haven't taken issue with any of that. It's
17 there, I don't know why I need a case agent to repeat the
18 information to me and tell me what I'm supposed to think about
19 it.

20 MR. LAURO: That wasn't the purpose at all, Your
21 Honor.

22 THE COURT: All right.

23 MR. LAURO: The purpose is to give the Court the
24 opportunity to hear without any kind of additional commentary
25 by lawyers as to the full extent of Mr. Donaghy's cooperation

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1 and the Government has not done that.

2 It's been our responsibility to do that, I
3 believe, in good faith that Mr. Scala has additional
4 information regarding the corroboration of the information
5 that Mr. Donaghy provided.

6 THE COURT: But corroboration means what? It just
7 means that he was being candid which no one seems to be
8 disputing at this point in time.

9 MR. LAURO: Well --

10 THE COURT: I don't think that you want to turn
11 these proceedings into a situation where you call a witness
12 and then we're going to have letters and submissions again by
13 the people referenced about how this never happened, and
14 somehow we're ending up with a trial of an entirely different
15 proceeding. I just think that it's taking the case pretty far
16 afield.

17 MR. LAURO: And we don't want to do that, Your
18 Honor.

19 THE COURT: Well, it seems like that's exactly what
20 you want to do, Mr. Lauro.

21 MR. LAURO: When I submitted my letter, the
22 Government's response was that Mr. Donaghy's cooperation was
23 overstated or exaggerated. I think now what the Government is
24 saying is that the extent to which Mr. Donaghy provided
25 information about game manipulation, that was either

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1 corroborated or confirmed, and as a result, Mr. Donaghy should
2 get full credit for that before Your Honor.

3 If that's the Government's position, that there
4 is absolutely no question that Mr. Donaghy's cooperation in
5 all respects with respect to the NBA matters was corroborated,
6 then I don't think there is a need.

7 THE COURT: I don't know what "corroborated" means
8 one way or the other. The Government has not come before the
9 Court and said that anything that you put in your letter is
10 something that they didn't, that is not true, that they're
11 disputing. I haven't seen anything like that from the
12 Government.

13 Am I wrong, Mr. Goldberg?

14 MR. GOLDBERG: I want to clarify one important
15 point.

16 THE COURT: Okay.

17 MR. GOLDBERG: We don't take issue that Mr. Donaghy
18 informed the Government of the matters set forth in
19 Mr. Lauro's June 10th letter, but a lot of it was
20 unsubstantiated and that's important.

21 So, we've never taken the position that
22 Mr. Donaghy has lied to us, but there's a difference between
23 telling the truth and believing you're telling the truth and
24 finding out later that a number of the allegations don't hold
25 any water.

1 MR. LAURO: Well, that gets to my point, Your Honor,
2 because if that's the case then I do want to call Mr. Scala
3 and he should tell Your Honor what's been corroborated and
4 what hasn't been because that goes to the significance of the
5 cooperation. It goes to the extent, it goes to the nature,
6 and those are all the factors under 5K that Your Honor is
7 entitled to hear about.

8 That's exactly the point that I was making. If
9 they're going to take the view that not everything was
10 corroborated, then Your Honor needs to hear from the case
11 agent.

12 MR. GOLDBERG: Your Honor, there is absolutely no
13 authority for what Mr. Lauro is asking this Court to do. He
14 cites Bruno. Bruno was a case where the Government declined
15 to file a 5K letter and the Court said that the district court
16 was nonetheless entitled to consider all information.

17 And, with all due respect to the Court, in
18 situations like these, unlike what Mr. Lauro is saying, the
19 Court does not have complete discretion. The cases that we
20 set forth this morning, and the cases in this line of
21 reasoning, give a tremendous amount of discretion to the
22 Government.

23 That's what the cooperation agreement does and
24 there's just absolutely no precedent, no basis, to support the
25 notion that when a cooperating defendant is somehow

1 dissatisfied with the Government's good-faith assessment that
2 they could call an individual agent. Agent Scala is not even
3 the case agent, he was the supervisory agent. They can call
4 individual Assistants to the stand? There is absolutely no
5 authority whatsoever for this kind of move.

6 MR. LAURO: Your Honor, there's a difference between
7 a cooperator who provides information which the Government may
8 or may not corroborate and substantiate and then a cooperator
9 like Mr. Donaghy who provides information that, in fact, the
10 federal agents have substantiated.

11 THE COURT: What is your basis for saying that?
12 That the federal agents have substantiated? What's your basis
13 for making that statement?

14 MR. LAURO: Well --

15 THE COURT: Do you have any basis of making that
16 statement?

17 MR. LAURO: I believe that that will be the
18 testimony.

19 THE COURT: But you don't have any basis.

20 The bottom line here is, under the terms of the
21 plea agreement, it's the good-faith determination by the
22 Office that the defendant has -- excuse me, let me go again.
23 That the Office's good-faith assessment of the value,
24 truthfulness, and completeness shall be binding on him.

25 You have made no showing that the Government

1 has operated in anything but good faith and it just seems like
2 to me that what we're exploring here is sort of a fishing
3 expedition of what you believe somebody may say or may not
4 say. Quite frankly, Mr. Lauro, my concern is it may
5 ultimately end up detrimental to your client as opposed to
6 being helpful to your client.

7 At this point in time, based on the
8 submissions, I understand that the Government at this point in
9 time based, based on their letter, believes that Mr. Donaghy
10 has been truthful about the principal matter about which he
11 cooperated.

12 They're not taking the position that he was
13 somehow being disingenuous about other information that he's
14 provided, but that's not the same as saying that it was
15 information that they felt that they could proceed on.

16 And I think that there's nothing in the record
17 to suggest that they're not operating in good faith, and I'm
18 not inclined to have a hearing on this matter. So, I'm going
19 to deny the motion to call Agent Scala on this.

20 I want to turn now to some of the issues
21 regarding the request for restitution.

22 Mr. Lauro, I want to clarify your position.
23 It's not your position that the NBA is not entitled to any
24 cost for assisting the Government, is it?

25 MR. LAURO: Our position is that the NBA would be

1 entitled to costs consistent with the statute, that's correct.

2 THE COURT: Well, what does that mean?

3 MR. LAURO: Well, to the extent that there are costs
4 that are a direct and proximate result of the activity that
5 Mr. Donaghy pled guilty to, then those costs would be
6 compensable.

7 Our issue is --

8 THE COURT: Tell me what you concede.

9 MR. LAURO: Well, what I would concede, for example,
10 is, in an instance where the NBA had to take time by employees
11 to respond to a government subpoena relating to Mr. Donaghy,
12 or to the extent that an NBA official took time off of
13 activities that related to Mr. Donaghy, those are compensable
14 costs.

15 What's not compensable under the statute are
16 instances where three or four lawyers spend hours and hours
17 prepping witnesses, or three or four lawyers spend hours
18 looking at documents that we don't even know what they are, or
19 instances in which multiple lawyers attend interviews by the
20 Government. Those are all costs that are clearly
21 consequential, clearly collateral, and are not recoverable.

22 THE COURT: Why are they collateral? There's a
23 difference between being overkill and being collateral.

24 I mean, you're not contesting, I take it, the
25 fact that the NBA paid all these bills.

1 MR. LAURO: I'm assuming that's the case. I don't
2 know, I can't tell what the NBA paid and what they haven't
3 paid or how they spend their money, but the problem is --

4 THE COURT: If they are required to hire lawyers to
5 meet with the Government and produce documents and they pay
6 those bills, as long as those costs are associated with doing
7 work connected with the investigation as opposed to doing some
8 or work that's not for the purposes of assisting the
9 Government, why wouldn't Mr. Donaghy be responsible for those
10 costs?

11 MR. LAURO: To the extent that they're reasonable
12 and appropriate and responsive to something that the
13 Government wanted, we don't contest that issue.

14 THE COURT: So, what do you say is a figure that you
15 think would be reasonable?

16 MR. LAURO: I don't know.

17 THE COURT: You've reviewed the records that have
18 been submitted and you've reviewed the affidavits. The
19 affidavits explain the entries. I agree with you that the
20 entries themselves are somewhat vague, but the affidavits
21 explain the entries.

22 In Paragraph 5 of your letter, you present
23 examples of some entries that don't make sense or you believe
24 don't make sense or are not specific enough. But then, when
25 you go to the various affidavits, and they explain those

1 entries and they explain what was being done and what was
2 being undertaken.

3 MR. LAURO: Here's the problem, though, Your Honor.
4 As you look through the affidavits, they are not very specific
5 as to what documents were reviewed, what witnesses were
6 interviewed, why there had to be multiple lawyers
7 participating.

8 For example, there are thousands and thousands
9 of dollars devoted to document production. We have multiple
10 lawyers looking at the same documents. We don't even know if
11 there was a thin file folder of documents or boxes of
12 documents. There's nothing specific in terms of the
13 information provided by the NBA.

14 There's no basis on which to draw a reasonable
15 conclusion as to whether or not these costs were necessary.
16 We have witnesses who are being interviewed. Now, the witness
17 time certainly is compensable, but we have multiple lawyers
18 spending hours and hours prepping these witness action. Why?
19 I have no idea. And why multiple lawyers had to be present
20 during those interviews.

21 THE COURT: I think at the interviews there were two
22 lawyers present.

23 MR. LAURO: I think that's right, but then there
24 were instances --

25 THE COURT: Have you done any analysis of the

1 records to suggest something like there were four lawyers
2 present or five lawyers present? I haven't seen that kind of
3 analysis.

4 MR. LAURO: I haven't either. I think there's
5 probably two for the most part. But what they haven't done is
6 broken down for Your Honor a chart that would explain or
7 identify each and every item that they were working on, the
8 lawyers present and the time spent.

9 We have, for example, Mr. Anders billing nine
10 hours for meeting with NBA executives and then 18 hours
11 spiking with the Government and the NBA executives. How is
12 that compensable under the statute?

13 THE COURT: This is not something you refer to in
14 your letter, is it?

15 MR. LAURO: Well, Your Honor, we take issue with all
16 of it, but we certainly identify issues of that nature,
17 absolutely.

18 THE COURT: Well.

19 MR. LAURO: And then we identify for the Court these
20 document productions that we have no knowledge of. We don't
21 have any information about what documents were produced. This
22 is a bare bones submission to the Court, it has not been
23 vetted by the Government which has the responsibility to go
24 through it and determine what's compensable and what's not.

25 Instead, the Government has said that every

1 dollar that the NBA wants, the NBA is entitled to get and
2 that's just not right.

3 A lot of this is duplicative. A lot of this
4 has multiple lawyers working on the same matters.

5 THE COURT: What is duplicative? Give me an example
6 of something that's duplicative.

7 MR. LAURO: First of all, when you look at these
8 affidavits, it's hard to identify exactly what the lawyers
9 were doing on particular days with respect to particular
10 witnesses. They don't identify the witnesses for us; they
11 don't identify the documents.

12 You have billings in June for a document
13 production, okay, from the Arkin firm we don't know how many
14 document were produced. We have multiple lawyers working on
15 it without identifying what tasks each lawyer was performing.
16 We have witnesses, or at least one witness produced. We have,
17 again, multiple lawyers preparing a witness and then probably
18 two lawyers showing up. And that's just June.

19 In mid-July, we have Mr. Anders spending hours
20 and hours, he says, talking with NBA officials. I don't know
21 how that's compensable. We then have a document production in
22 August which was handled by Mr. Anders's firm. We have no
23 idea what was produced, why it was produced, at whose
24 direction. All we have know is that multiple lawyers, Anders,
25 Shin, Waldman and paralegals were reviewing those documents.

1 None of those tasks are broken down in any particular detail.

2 We then go to August where there were multiple
3 witnesses produced. The Government says that they asked those
4 witnesses to be produced. The witness time would be
5 compensable and maybe time for a lawyer to show up with a
6 witness, but why does it take multiple lawyers to prepare a
7 witness who was a witness, not a subject or a target, as well
8 as multiple lawyers being present for the interview.

9 We then go to October where there was an
10 additional document production. And, again, this is all after
11 Mr. Donaghy has pled guilty. We don't know what documents
12 were produced, but we do know that at least two lawyers were
13 working on the document production.

14 Mr. Anders, during that production, spent over
15 five hours speaking with government lawyers without any detail
16 of the subject matter or why it was necessary. I don't think
17 I've spent five hours talking to government lawyers.

18 We go into April where we have other documents
19 produced. This attempt by the NBA clearly does not conform to
20 what courts require in terms of a clear, specific, demarcated
21 proposal or submission. We cited the Krear v. 19 Trustees
22 case which is a Second Circuit decision.

23 THE COURT: Is that a decision on restitution or a
24 decision on lawyers' fees?

25 MR. LAURO: Correct. But I think that's applicable

1 here where the concept of reasonable fees require lawyers to
2 identify specifically what they're asking for in order for the
3 Court to make a reasonable determination, and I think the
4 restitution fee requires a reasonable determination. You're
5 not entitled to the Bentley of law firms, you're entitled to
6 what's reasonable. And here what we have is a situation where
7 they were working on multiple tasks that could be performed by
8 one lawyer or not any lawyer at all, for example. A lot this
9 work could have been done by paralegals, instead it was done
10 by layers of lawyers.

11 THE COURT: Where do you make that argument in your
12 letter? Anywhere that the work was done by people that it
13 shouldn't have been done by. That's not in your letter.

14 MR. LAURO: It's not specifically, but certainly --

15 THE COURT: I went through every entry that you made
16 in your letter and looked at the records to see whether there
17 was some explanation for it and I found explanations. But
18 what you're saying now I don't think you've said before.

19 MR. LAURO: Well, I think what I'm saying now is
20 certainly implicit in the letter, and also, what our complaint
21 was fundamentally we can't tell from these affidavits.

22 THE COURT: So, then, it's your position that
23 because you can't tell specifically from the affidavits or
24 there's not enough detail that they're entitled to no
25 compensation.

1 MR. LAURO: Yes, Your Honor, because it's their
2 burden. And I think you can tell from these time records that
3 it was never anticipated that restitution would be sought
4 because, otherwise, you'd have time records that were very
5 clear in terms of the particular tasks that were being
6 performed and here what we have is sort of block time entries
7 that don't identify clearly what those tasks were.

8 And for the Court to draw a reasonable
9 assessment as to what was required, I think Your Honor needs
10 more information. To just say to the Court, "Yeah, we did a
11 document production and we put three lawyers on it is not
12 enough sufficient."

13 There has to be at least a degree of
14 specificity that allows the Court to determine what's
15 reasonable and what's not reasonable and they haven't done
16 that for Your Honor. Instead, they've submitted very
17 generalized affidavits that say, "Yeah, we prepped witnesses
18 or we did document productions," but how can the court based
19 on that draw a logical assessment as to what was reasonable or
20 not.

21 I found, for example, a letter that was \$1,500,
22 a two-paragraph letter to me that they were going to
23 originally charge us --

24 THE COURT: They're not.

25 MR. LAURO: They took that out.

1 THE COURT: That's not in their submission.

2 Now, is there anything in their submission
3 that you can point specifically now that is not appropriate.

4 MR. LAURO: I can't tell, it's impossible to tell.
5 If Your Honor is told that we produced a notebook of
6 documents, and there were five lawyers reviewing those
7 documents and three paralegals, that's not reasonable I
8 submit. There's no way of telling that based on this
9 information that the NBA has provided.

10 They haven't done that, they haven't provided
11 requisite detail, and frankly, it's the Government's
12 responsibility under the statute to provide that information
13 under §3664(e). It's the Government's burden to go through
14 and determine what's compensable. Rather than just accepting
15 what has been submitted by the NBA, it requires a lot more
16 than just saying, "Here's what we charge the NBA and you have
17 to pay for it," without going through line by line and
18 determining what's reasonable and what under the statute is
19 compensable.

20 THE COURT: Mr. Goldberg, before I hear from you, do
21 you want to be heard on this?

22 And what is your position with respect to the
23 issue? Taking, first of all, with respect to the salary
24 issues, you are now in agreement with Mr. Lauro's position
25 that Mr. Donaghy is not responsible for any of the other

Oral Argument

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1 seasons.

2 MR. GOLDBERG: Under Restitution Law.

3 THE COURT: Which is the conclusion the Court had
4 come to at the last proceeding which is why I was questioning
5 you so carefully about that.

6 MR. GOLDBERG: Yes.

7 THE COURT: You agree with the Court's assessment of
8 what the case law is and you agree with Mr. Lauro on that?

9 MR. GOLDBERG: Indeed, Your Honor.

10 THE COURT: Okay. Now, with respect to the \$76,000
11 versus the \$46,000.

12 MR. GOLDBERG: Or 72.

13 THE COURT: 72 versus 46 depending on whose figures
14 you're looking at, this deals with Mr. Donaghy's compensation.

15 Originally, I believe in the pre-sentence
16 reports, what had been done was just the game percentage was
17 taken of the base salary, not all the additions.

18 MR. GOLDBERG: Right.

19 THE COURT: What is the Government's position with
20 respect to that issue?

21 MR. GOLDBERG: Well, first, let me start by saying
22 that the \$45,000, I think it is, that we came to, or \$43,000,
23 was an estimate for the purposes of the guidelines. It wasn't
24 a --

25 THE COURT: For the loss?

Oral Argument

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1 MR. GOLDBERG: For the loss, right, for '06-'07.

2 It wasn't intended to be a line item
3 calculation for the purposes of Restitution Law. We were at a
4 bit of a disadvantage because it's the NBA that has all the
5 payroll records and knows better what it pays its employees.

6 THE COURT: But, I understood you this morning to
7 say that you weren't taking a position on that, that's what I
8 wanted to hear, that was this morning.

9 MR. GOLDBERG: I haven't found any law which sort of
10 draws a line on a services case like that, and there aren't a
11 lot of cases like this, where it draws a line on an honest
12 services case between the actual services provided, the salary
13 versus fringe benefits, or expenses incurred on the part of
14 the employer going to the location, for example, where the
15 services need to be provided.

16 I, frankly, don't have a position, Your Honor,
17 and I think it's well within the Court's discretion to include
18 those costs but we don't have a position.

19 THE COURT: Aren't you going to have to be the party
20 responsible for defending what the Court does in the Court of
21 Appeals?

22 MR. GOLDBERG: We are, Your Honor, and as I say I
23 think it's well within the Court's discretion.

24 THE COURT: To pick either figure.

25 MR. GOLDBERG: I think you could.

Oral Argument

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1 THE COURT: All right.

2 MR. LAURO: We obviously have --

3 THE COURT: Now, let me ask you about the other
4 issues --

5 MR. GOLDBERG: Right.

6 THE COURT: -- that Mr. Lauro has been addressing
7 and, Mr. Shechtman, I will give you your time to speak.

8 MR. GOLDBERG: I will let Mr. Shechtman speak, of
9 course --

10 THE COURT: No, I want to hear from you.

11 MR. GOLDBERG: I'm going to, Your Honor.

12 I think what Mr. Lauro is proposing is a more
13 exacting set of requirements than is set forth under the
14 restitution statutes.

15 Your Honor has gone back at the victim multiple
16 times and asked it to more precisely substantiate the costs
17 and break things out; and I think in fairness that the victim
18 in this case has taken a fairly reasonable approach by
19 eliminating items like the \$1,500 item that Mr. Lauro has
20 identified. I will say, for the record, that I don't recall
21 ever having a witness meeting where the witness was
22 accompanied by more than two lawyers. And, so, I think the
23 victim in this case has provided sufficient information and
24 we're prepared to defend on appeal if that's what you're
25 getting at, Judge.

1 THE COURT: The only reason I made those comments,
2 Mr. Goldberg, is I don't think the Government can simply take
3 the position on these issues, well, you know, whatever you
4 want, beats me. I think the Government has to argue a
5 position one way or the other.

6 MR. GOLDBERG: And we have, Your Honor.

7 THE COURT: It's not just Mr. Shechtman, I
8 understand you're doing that now.

9 MR. GOLDBERG: We also did it in our letter. We
10 indicated in our letter that the costs are recoverable under
11 the law and that's our position.

12 We tried to set forth for Your Honor --

13 THE COURT: And you don't believe that, as Mr. Lauro
14 has stated, based on your knowledge of the case, that this was
15 overkill or anything in connection with producing documents to
16 the Government.

17 MR. GOLDBERG: Your Honor, obviously I'm not privy
18 to what is done inside the law firm.

19 THE COURT: Right.

20 MR. GOLDBERG: But I can tell you that I reviewed
21 line by line the cost submissions, the exhibits, and nothing
22 jumped out at me as being out of the bounds of what assistance
23 was provided.

24 Mr. Lauro has, at times, questioned why the NBA
25 has been communicating with the Government. They're a victim

1 in a criminal case. I mean, it's routine for us, for the
2 Government to communicate with the victim of a criminal case,
3 whether it be the widow of a murder victim or the victim of a
4 white collar fraud. So, I don't think there's anything
5 nefarious about that.

6 THE COURT: I take it, Mr. Goldberg, that it would
7 also be the Government's position that the case law regarding
8 restitution is not precisely on all fours with the case law
9 that talks about recovering attorney's fees.

10 MR. GOLDBERG: In a civil context, yes, you're
11 right. And I think that all goes within the Court's
12 discretionary standard. I believe that if Your Honor is
13 seeing costs and is persuaded by Mr. Lauro's arguments that
14 costs are excessive, it's well within the Court's discretion
15 to curtail the award. I haven't seen that, based on what I'm
16 privy to, I haven't seen that in the submissions.

17 THE COURT: This is a very minor entry, but one I do
18 have a question about is I don't take it, Mr. Goldberg, that
19 it was the request of the Government to have attorneys for the
20 NBA attend any of the proceedings before this Court.

21 MR. GOLDBERG: It wasn't by request, but I think the
22 statute specifically provides for that. If I'm not mistaken.

23 THE COURT: It says, "Attendance at proceedings,"
24 but that presumes to me that they're a witness or something.
25 I mean, there was no need for the Government, in terms of the

1 Government's investigation, to have NBA lawyers either present
2 at Mr. Donaghy's plea or at any of the proceedings involving
3 Mr. Battista or Martino.

4 MR. GOLDBERG: There was no investigative interest
5 for that, but I will say that under the new victim statutes,
6 the Government is required to inform the victim about every
7 proceeding, however minor, and presumably with the goal of
8 allowing them to attend if they want to. So, I think that
9 does fall within the statute, Judge.

10 THE COURT: Okay. Mr. Shechtman you just want to be
11 heard briefly?

12 MR. SHECHTMAN: Very briefly, Judge.

13 I take it that if I understand the math now I
14 have three people, most importantly including the Court,
15 against me on the 2003-2006 issue. I do think there is law on
16 our side, but I won't press the point if the Court has settled
17 on it.

18 On the issue of investigative costs, we've
19 tried very hard to detail what those were. I don't think they
20 were extravagant. Mr. Lauro has a way of continuing to use
21 the word "multiple" when the answer always turns out to be
22 two. I don't think in this district or any other two is
23 unreasonable.

24 We have not identified the witnesses or the
25 specific documents at the Government's request, but I hear the

Oral Argument

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1 Government is saying, knowing who the witnesses were and what
2 the documents involved were, that those efforts were
3 reasonable and my own sense supports that.

4 And, as to participation at proceedings.

5 THE COURT: Right. You want to address that?

6 MR. SHECHTMAN: I can give the Court a case, I don't
7 have it with me, but I know there is one case where the victim
8 showed up at sentencing and the answer was: Compensable.
9 That it wasn't simply proceedings to testify at, it is
10 proceedings to keep up and know what's going on with the case.

11 It is particularly important to the NBA because
12 what was partly so harmful in this crime was the reputational
13 loss which one can't be compensated for. But to be here, to
14 know what was being said, to be on top of the matter so that
15 the Commissioner and others were in a position to respond to
16 questions was critical to the NBA and that's why lawyers were
17 here, it was not for a voyeuristic purpose.

18 THE COURT: It was not for what?

19 MR. SHECHTMAN: A voyeuristic purpose.

20 THE COURT: I'm not suggesting it was inappropriate
21 for anyone to attend the proceedings, that wasn't my point.
22 The question was whether it was compensable.

23 MR. SHECHTMAN: And, Judge, if you'll accept one
24 more one-sentence letter from the NBA, I will send you a cite
25 of a case.

Oral Argument

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1 THE COURT: That means I have to have four more
2 submissions from everyone else. I'm not sure I'm up to it.

3 MR. SHECHTMAN: Whatever the Court wants.

4 THE COURT: No, that's all right I really don't want
5 any additional submissions.

6 MR. SHECHTMAN: And nothing further.

7 THE COURT: All right. Thank you.

8 This, again, is a minor point but let me just
9 raise it. This deals with the fees sought for the Arkin firm.
10 I think this is just a mistake, but you're seeking \$21,828 and
11 that's a figure the Government relied on. But that was in
12 your letter, Mr. Shechtman, but I think when you go back and
13 look at these figures themselves it's \$21,878. I think that's
14 totally a minor point over \$50 this was a mistake.

15 Am I correct about that?

16 MR. SHECHTMAN: Yes.

17 THE COURT: Do you understand that, Mr. Lauro?

18 MR. LAURO: Yes.

19 THE COURT: And, Mr. Lauro, one thing that I also
20 need from you is, another minor point, is Page 2 of Steven
21 Block's report which was not sent, it was not in the copy. I
22 don't think there's anything further you need to add to your
23 remarks with response to Mr. Shechtman.

24 MR. LAURO: There is one issue, Your Honor.

25 THE COURT: Okay.

Oral Argument

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1 MR. LAURO: That is the offsetting amounts that we
2 haven't addressed.

3 THE COURT: Well, I understand that the money that
4 was not paid, the 40 something thousand dollars was not
5 included in the restitution.

6 So what's the offset issue?

7 MR. LAURO: Well, we also have the severance amounts
8 that Mr. Donaghy would be entitled to and that, I think, adds
9 up to about \$130,000.

10 THE COURT: I imagine that there's some --

11 Is that the subject of any dispute whether he's
12 entitled to those severance payments?

13 MR. LAURO: I don't think so. I also believe, Your
14 Honor, if you recall at the last hearing, the Government said
15 a portion of the \$40,000, really, should be identified as
16 money going back since the NBA retained that money.

17 THE COURT: I didn't think that was the Government's
18 position.

19 MR. LAURO: I thought that was your point.

20 MR. SHECHTMAN: Judge, if I may?

21 THE COURT: Yes, on the severance issue. Is that
22 something that's the subject of civil action or dispute.

23 MR. SHECHTMAN: It's a subject of dispute because
24 our understanding of New York State Law is, as an unfaithful
25 servant, he's not entitled to anything that he earned or going

1 forward might claim. So, the answer is very much so.

2 And, I would say on what Your Honor called,
3 "The higher math issue," because you take it out of the top,
4 it is the case that a portion of it winds up going in his
5 favor.

6 So, I think that's all the Government said last
7 time, that we both think it comes off the top. It's Your
8 Honor's higher math and that's what we did in our calculation.

9 THE COURT: So, it shouldn't be an offset?

10 MR. SHECHTMAN: Shouldn't be an offset because it's
11 been subtracted from the salary figure.

12 THE COURT: And that's the Government's position as
13 well?

14 MR. GOLDBERG: Yes.

15 THE COURT: Okay. All right.

16 Then, I think we've adequately addressed those
17 issues. I don't think there's anything else that we haven't
18 addressed in your submission.

19 Is that correct, Mr. Lauro?

20 MR. LAURO: Not that I'm aware.

21 THE COURT: All right. Thank you.

22 Ms. Herr, do you want to be heard?

23 MS. HERR: Yes, Your Honor.

24 In the rush to submit a letter to the Court, I
25 missed a couple issues.

1 THE COURT: Okay.

2 MS. HERR: And the Court touched on one which dealt
3 with the time period between April 10th and April 28th of
4 2007. 2008, I'm sorry, which affects, which the Government
5 suggests can be parsed out of the full amount of restitution
6 and assigned to Mr. Battista and Mr. Martino. And, of course,
7 they now conceded that they've made a mistake on the front end
8 and they've made a mistake on the back end, and I guess when
9 I -- and then the Court brought to my attention, which I
10 hadn't really realized, that the Government then -- that the
11 NBA submitted an affidavit which supports the charges for all
12 of the charges. But I specifically am dealing with the ones
13 from April 10th to April 16th which are the only ones that are
14 really kind of directly claimed to be associated with
15 Mr. Martino.

16 When I look at Mr. Anders --

17 THE COURT: That's not the only amount that
18 Mr. Martino is being held accountable for?

19 MS. HERR: No, but he is being held for --

20 THE COURT: Solely accountable for.

21 MS. HERR: Yes. I think the Government's position
22 is that the charges between April 10th and April 16th.

23 THE COURT: Right.

24 MS. HERR: I think that's his position today are
25 assignable to Mr. Martino and Mr. Battista.

1 THE COURT: Only?

2 MS. HERR: Only.

3 MR. GOLDBERG: I think Ms. Herr is speaking in the
4 context of the Government assistance costs.

5 MS. HERR: Correct.

6 MR. GOLDBERG: Not the honest services loss.

7 MS. HERR: I'm only dealing with the participation
8 charges and I think, I guess, the only reason I bring this to
9 the Court's attention. One of the arguments I made was
10 similar to Mr. Lauro's is that they are not specific and
11 difficult for the Court to determine.

12 The Government has suggested that they are, in
13 fact, attributable to only Mr. Martino and Mr. Battista but
14 certainly the Court did not include that from the documents
15 that have been submitted by the NBA.

16 And I point, specifically, to the time records
17 of Mr. Anders and then his affidavit. His affidavit suggests
18 that he spent 16 hours and he explains responding to requests
19 for documents, coordinating witness preparation sessions, and
20 supervised production of additional documents.

21 But when you look at the specific entries, and
22 I could do this more easily than Mr. Lauro, because I am
23 dealing with a very small period of time. All I see is
24 multiple e-mails, multiple TCs, multiple e-mails. I don't
25 know how that relates to responding to requests, coordinating

1 witnesses. I don't understand that and I guess I don't know
2 why the Court has to rely on the representations of the
3 Government or the NBA. I don't know what any of those costs
4 do, I don't know. And I think, in retrospect, the Government
5 could say, "Gee, yeah must have been Mr. Martino owes or
6 Mr. Battista's expenses." But there is no way for the Court
7 to independently and objectively determine that from the
8 records that have been submitted.

9 And I made that in one of my arguments that the
10 NBA, if it really wanted to assess the parties for the costs,
11 should have isolated the time they spent on procuring
12 documents, prepping witnesses, and reviewing documents and all
13 the other costs that they've charged to the 2006-2007 season
14 and they did not do that. They want the Court now to look at
15 all the costs and, again, the only ones that you can actually
16 look at.

17 THE COURT: In other words, your concern is that
18 because you believe some of the document production dealt with
19 previous seasons and your client was only involved in the one
20 season that he should not be held accountable for that, for
21 any portion of those costs.

22 MR. LAURO: Correct.

23 MS. HERR: Correct. And there are many documents
24 that we received and I'm sure the Government has many more
25 that we have not received, that deals with the period

1 2003-2004, 2004-2005, 2005-2006, and some of 2006-2007 that
2 don't relate to the period that my client pled guilty to.

3 THE COURT: You don't mean that you received in
4 discovery?

5 MS. HERR: Yes. And based on the records, there
6 were a lot of documents that I haven't received because there
7 are a lot of records and I don't have that many, but I have to
8 assume that the Government, because it has gotten records that
9 relate back to 2003 and, again, I won't go through all those
10 years.

11 So, I guess when you look at this, I don't know
12 how you could possibly determine what costs are associated
13 with the 2006-2007 season. And then to be more specific, I
14 don't know how you determine what costs were specifically
15 Mr. Martino's and Mr. Battista's when the Government says that
16 period between April 10th and April 16th and that may seem
17 small, but I think that's indicative with the problem with the
18 restitution.

19 It doesn't really relate to the affidavits
20 supplied by the witnesses and it's hard for the Court to
21 determine based on the entries exactly what the NBA did and
22 for what defendant or what years.

23 In addition, Your Honor, I conceded the \$9,930
24 for the game review and I was rushed and I was not quite sure
25 if the game review consisted of games from the 2003 season all

1 the way up to 2007. If it does, then I would suggest to the
2 Court that I don't really mean that because I don't know that
3 I saw anything and there may have been something in discovery
4 in the documents that were provided but I've spent --

5 THE COURT: Was the game review just of the one
6 season?

7 MR. GOLDBERG: I believe it was '06-'07, but if I
8 can make a legal point?

9 I think what Ms. Herr is trying to do,
10 understandably, is say that because we can parse out certain
11 costs, then those that we can't parse out should be completely
12 excluded.

13 And the Fogel decision itself, that's the
14 holding of Fogel, well, that's what they did in Fogel; I don't
15 know if it was direct holding. The victim came forward, it
16 was Metropolitan Insurance Company, and said, "We can't parse
17 out between these co-conspirators." The Court said, "You
18 don't have to, it's still recoverable."

19 And so, although I believe in the view that if
20 you can parse out you should properly apportion, I don't
21 believe the inverse is true, that if you can't parse out then
22 it's completely not recoverable.

23 THE COURT: So, your belief would be since you can't
24 parse out from the document production --

25 MR. GOLDBERG: Exactly.

1 THE COURT: -- documents that were produced or
2 researched for earlier times versus those that pertain
3 directly to the later season that Mr. Martino was involved in.

4 MR. GOLDBERG: Right. And there may be documents
5 that the document itself covers multiple periods; or if you
6 want to talk about witnesses, the witness may have something
7 to say about both time periods. I mean, it would be almost
8 impossible to get down to that level of detail in hindsight.

9 MS. HERR: But, Your Honor, I think that points to
10 the foolishness of the Government's position.

11 I read Fogel myself and the conspiracy in that
12 case involves two individuals that are involved in a fraud.
13 There is no argument, there is no discussion about it being
14 separate time frames that one preceded the other.

15 There are things that distinguish this case
16 from the Metropolitan claim. In that claim, they were
17 involved in a fraud and the allegation is that they were
18 involved in a fraud that covered a particular timeframe
19 involving people who had different roles: A doctor and a
20 chiropractor. I mean, a lawyer and a chiropractor, excuse me.

21 In this case, the Government and the NBA's
22 position is that Mr. Martino would have to have foreseen that
23 the investigation would go back to 2003, and when we deal with
24 restitution we are looking for directly and foreseeability and
25 clearly Mr. Martino could have not foreseen that what he did

1 in December of 2006 would have led to an investigation that
2 went back to 2003.

3 THE COURT: But wasn't he aware, I mean, of the fact
4 that the entrée into Mr. Donaghy. Their entrée into
5 Mr. Donaghy, Mr. Martino and Mr. Battista was, as a result of
6 their knowledge that he had been engaging in transactions
7 with, I believe, it's Mr. Concannon. So, understanding the
8 genesis of their relationship, he would have understood that
9 they would have looked backward.

10 MS. HERR: I guess that's something that he learns
11 in 2006. He learns -- and I don't know that he -- there is
12 certainly no evidence that he understood that it preceded the
13 2006-2007 season.

14 So, the season is already underway. The season
15 begins in October, I believe. Mr. Martino becomes involved
16 December 16th, I think is the earliest date that the
17 Government can point to. So that there is certainly no reason
18 for Mr. Martino to assume that it occurred in the seasons
19 preceding that. There is just nothing to that effect, we know
20 that the season is already underway. We know that at some
21 point during the season, Concannon is giving picks to Donaghy
22 and they act on that information. Mr. Battista suggests
23 acting on that information and enlists Mr. Martino.

24 So, the Court -- you would have to speculate
25 that the Mr. Martino have any understanding that it preceded

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1 2006. I don't think that's a foreseeable consequence.

2 THE COURT: You mean his only understanding was that
3 the activity with Concannon was in 2006 and not earlier.

4 MS. HERR: Yes.

5 THE COURT: That wasn't my understanding factually.
6 But, Mr. Goldberg, am I incorrect about that?

7 MR. GOLDBERG: You are correct. It certainly
8 preceded the initiation of the charged conspiracy.

9 THE COURT: Right.

10 MR. GOLDBERG: But, I think the short answer to the
11 argument that Ms. Herr is making is that it's unquestionably
12 direct and foreseeable to Mr. Martino that once the Government
13 catches wind of the charged conspiracy; that the Government is
14 going to look backwards and forwards, especially since
15 Mr. Martino knew that there was gambling activity that
16 predated his entry into the scheme.

17 THE COURT: Well, that was my point.

18 MR. GOLDBERG: Yes.

19 THE COURT: That he knew about it. Was there
20 evidence that he knew about it as far back as the --

21 MR. GOLDBERG: I don't know if that's the case, but
22 I don't think that matters. And, again, we're talking about
23 this in the context of costs incurred by the NBA participating
24 in the investigation and prosecution by the Government.

25 So, I think it's a more -- it's a broader

1 standard than what Ms. Herr is articulating.

2 THE COURT: Okay. Is there anything further?

3 MS. HERR: The only thing I also didn't bring to the
4 Court's attention. And, actually, the Government cited in its
5 letter, is that the Court is permitted to apportion liability
6 based on the economic circumstances of each defendant and the
7 role that each defendant played in the offense.

8 So, although I've listed what I believe are the
9 correct restitution figures, I haven't suggested to the Court
10 that they could be apportioned based on role in the offense
11 and economic circumstances.

12 And I think in light of the fact that
13 Mr. Donaghy received a salary that is part of the restitution,
14 it would be unfair to Mr. Martino to assess an equally, and in
15 that part of the restitution.

16 In addition, as to the participation costs, and
17 I think that may be more appropriate, if the Court believes
18 that Mr. Martino is, in fact, responsible for the costs that
19 date back to the 2003 part; that, again, it should apportion
20 it based on the role of each individual in the offense and the
21 economic circumstances and that would allow the Court then to
22 address the number, whatever number that the Court determines
23 is appropriate, in a manner that would be fair to Mr. Martino
24 and I think --

25 THE COURT: By apportionment, you are suggesting

1 that if I determine the entire amount of restitution that he's
2 responsible for to be X number that then I should divide that
3 number and only make him responsible for a lesser portion
4 based on his local.

5 MS. HERR: Yes, that's my understanding of the
6 Cutrell case. And, again, I was under pressure and really
7 didn't have a chance to --

8 THE COURT: What case was that?

9 MS. HERR: United States v. Cutrell, 209 F.3d, 1286.
10 And that's all I have, Your Honor.

11 THE COURT: Does the Government have any position
12 with respect to the issue of apportionment one way or the
13 other?

14 MR. GOLDBERG: In our submission on Monday, I wanted
15 to comment further to the Court about what may be a
16 discrepancy within the statute or at least something that I
17 don't fully understand, I will get you an answer by Monday.
18 And that is Section 3664 when it speaks of multiple
19 defendants. It says that you can consider, as Ms. Herr I
20 think probably quoted from, the economic circumstances of each
21 defendant. But I believe the Mandatory Victim Restitution Act
22 did away with consideration of economic circumstance of the
23 defendant.

24 Now, those two points may be reconciled by
25 saying that whether to impose restitution should be done

1 without consideration of economic circumstances, but once you
2 apportion you can consider relative economic circumstance.
3 And I suspect that you may already know the answer to that,
4 but I will certainly comment on that in our letter on Monday.

5 THE COURT: All right.

6 (Pause.)

7 THE COURT: I just have one other factual question
8 that I should address to you because I'm not sure what the
9 Government's position was.

10 But, with respect to the information about
11 Mr. Donaghy's prior betting activity that is included in his
12 relevant conduct --

13 MR. GOLDBERG: Yes.

14 THE COURT: -- Mr. Lauro suggests that that's
15 information that came directly from him. And my question is
16 whether the Government had prior information about that prior
17 to Mr. Donaghy's cooperation.

18 MR. GOLDBERG: This is the §1B 1.8 issue which we
19 specified in one of our letters. The answer is: We did.

20 THE COURT: You did?

21 MR. GOLDBERG: We did. And I think we indicate in
22 the letter that Mr. Concannon himself informed us of that.

23 THE COURT: I just didn't know the timing of that.

24 MR. GOLDBERG: I think I do indicate that he
25 informed us first. I suspect what Mr. Lauro is going to say

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1 that Mr. Donaghy revealed that much earlier. That may be true
2 but not to the extent and with the level of detail that
3 Concannon did prior to Mr. Donaghy revealing that information.
4 I will, for the record, note that §1B 1.8 doesn't apply.

5 THE COURT: I know that.

6 MR. GOLDBERG: Okay.

7 THE COURT: But to the extent the one thing I wanted
8 to know factually is the information about his prior activity.

9 MR. GOLDBERG: Yes.

10 THE COURT: Did that come to the Government's
11 attention first through Mr. Donaghy --

12 MR. GOLDBERG: The existence --

13 THE COURT: -- first or through another individual.

14 MR. GOLDBERG: The existence of prior activity from
15 Mr. Donaghy; the level of detail from Mr. Concannon, yes.

16 THE COURT: So, Mr. Donaghy is the one who first
17 brought to your attention that he had been engaged in other
18 betting activity. The first time the Government knew that was
19 through him.

20 MR. GOLDBERG: That's definitely before
21 Mr. Concannon's debriefings. Whether the Government knew
22 about that already I don't know the answer to that. I believe
23 we did not know about that, I'll defer on that, and I will
24 concede that Mr. Donaghy was the one who brought that to our
25 attention.

1 MR. LAURO: Your Honor, and also in fairness, the
2 first proffer as you can imagine was more of a superficial
3 examination of a lot of areas and then I think what happened
4 is after Mr. Donaghy revealed that voluntarily, even before a
5 cooperation agreement.

6 Following that proffer, the Government went to
7 Concannon and obviously got a great deal of more information.

8 THE COURT: The timing issue is the issue I wanted
9 to identify.

10 MR. LAURO: Your Honor, one other thing, and I don't
11 think the Court misapprehends, Mr. Donaghy's allegations of
12 game manipulation of other referees. There is no suggestion
13 that Mr. Donaghy participated in that game manipulation and I
14 just want to make that clear to the Court. There is no
15 suggestion in Mr. Donaghy's cooperation that information he
16 provided to the Government in any way suggested that he
17 himself was involved in game manipulation.

18 THE COURT: That was very clear from your letter
19 what your position was.

20 MR. LAURO: Thank you, Your Honor.

21 THE COURT: Is there anything else?

22 MR. GOLDBERG: I think we've spoken on that issue --

23 THE COURT: I don't want to hear anything else on
24 that issue.

25 MR. GOLDBERG: Fair enough.

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1 THE COURT: And what you just said, Mr. Lauro, was
2 said about three different times in your submission. So, if I
3 miss that point, you know, heaven help all of you. I
4 understood that clearly, okay?

5 Is there anything else? The Government is
6 going to provide me with their letter on Monday where you
7 outlined all of your statements that you made about the
8 restitution issues, about what you're taking in and out.

9 MR. GOLDBERG: Yes, Your Honor.

10 THE COURT: All right. Thank you.

11 MR. GOLDBERG: Thank you.

12 MR. LAURO: Thank you.

13 (WHEREUPON, the proceedings were adjourned to July
14 24, 2008, at 9:30 a.m.)

15 * * *

16

17 CERTIFICATE OF REPORTER

18 I certify that the foregoing is a correct transcript of
19 the record of proceedings in the above-entitled matter.

20

21

22

23 Anthony D. Frisolone, CSR, RDR, FCRR, CRI
24 Official Court Reporter

25

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